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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-606

LORRAINE KROMNICK, LORRAINE BRANCATO, GLADYS HIRSH and REGINA KATZ,
Petitioners

v.

SCHOOL DISTRICT OF PHILADELPHIA and BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF PHILADELPHIA,
Respondents

On Petition For a Writ of Certiorari To The United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE CASE

This case deals with the constitutional and statutory validity of a race-conscious teacher transfer policy adopted and maintained by a public school district in order to remedy judicially-recognized and ongoing *de facto* segregation, and to insure to children within every school in the district the educational benefits of racially diverse faculties. The policy, known as "75/125", prefers no racial group over another, neither on its face nor in appli-

cation; it requires the firing or lay-off of no teacher; it affects no monetary benefit; and it allows teachers who are involuntarily transferred pursuant to the policy to retain accumulated "building seniority" in their new schools and preference with respect to future vacancies at their former schools. Furthermore, the policy has been repeatedly adopted by petitioners' collective bargaining unit in biennial contract negotiations.

The 75/125 policy is but one part of a 20-year effort by the School District of Philadelphia ("School District") to eradicate the earmarks of *de facto* segregation from its school system. The policy's purpose and impact extend beyond the narrow objective of integrating school faculties: by achieving and maintaining faculty integration within the numerous schools in the system, the School District has eliminated the role which racially segregated school faculties formerly played in perpetuating the implication that particular schools were intended for students of a particular race. Thus, 75/125 has become one of several devices employed by the School District in a continuing program to satisfy directives from state judicial and administrative authorities to remedy the racial isolation of black public school students.

Petitioners seek to obscure the breadth of the context in which 75/125 was adopted and maintained. They would have it appear that once the school faculties were desegregated, there was no reasonable basis for the School District to continue to employ the policy. Petitioners therefore begin their statement of the history of this policy in June, 1982, when the Office of Civil Rights of the United States Department of Education ("OCR") determined that the School District was "substantially in compliance" with regulations which required the School District as a condition of eligibility for federal aid under the Emergency School Aid Act (ESAA), 20 U.S.C. §3191-3207 (repealed effective October 1, 1982), to undertake remedial action to correct a policy or practice of "racially identifiable" teacher assignments. While relieving the

School District of any further obligation under Department regulations to comply with the 75/125 policy, OCR, in a June, 1982 letter, stated that the School District was "free to continue to maintain [the policy] if it so chooses," and admonished the School District of its continuing obligation to use nondiscriminatory policies. On August 2, 1982, consistent with OCR's advice, the School District chose to continue the 75/125 policy. It is the subsequent period of voluntary adherence to 75/125 which petitioners contend offends Title VII and the 14th Amendment to the Constitution.

In fact, a more accurate exposition of the history of this case would begin substantially earlier than 1982, and even earlier than 1978, when 75/125 was adopted by the School District in order to obtain federal funding to support its desegregation effort. It would begin as early as 1965 when the School District began utilizing race as one factor in determining assignments of newly hired teachers in order to attain integrated faculties in all schools throughout the school system. In 1968, the Pennsylvania Human Relations Commission ("PHRC"), a state agency invested with authority to require school districts to take corective measures to overcome both *de jure* and *de facto* segregation,[1] initiated proceedings to compel the School District to eliminate racially identifiable schools in Philadelphia.[2]

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1. *Balbaugh v. Rowland*, 447 Pa. 423, 438, 290 A.2d 85, 93 (1972); *Pennsylvania Human Relations Commission v. Chester School District*, 427 Pa. 157, 233 A.2d 290 (1967).

2. The Third Circuit Court succinctly summarized the protracted history of PHRC's litigational efforts to compel the School District to adopt measures which PHRC felt would be most effective in remedying the intractible pattern of *de facto* segregation within the Philadelphia public school system. *Kromnick v. School District of Philadelphia*, 739 F.2d 894, 897, 904-905 n.10. (3d Cir. 1984). The numerous court decisions which have been rendered in the state litigation, while acknowledging good faith efforts on the part of the School District, *see, e.g., Pennsylvania Human Relations Commisison v. School District of Philadelphia*, 66 Pa. Commonwealth

Integral to the School District's response to PHRC's desegregation demand was a contract provision agreed upon by the School District and the teachers' union which prescribed that the faculty in each elementary school shall consist of at least 20% of the race in the minority, and in each secondary school, shall consist of at least 10% of the race in the minority. In order to implement this numerical goal, the School District and union agreed that newly hired teachers would be assigned race-consciously to integrate racially identifiable faculties. They also agreed to encourage voluntary teacher transfers which would aid racial balance and to restrict voluntary transfer options if the transfers would delay elimination of or create racially identifiable faculties. The provision prescribed both limiting the placement choices of involuntarily transferred teachers so that their choices would not create or exacerbate racial identification, and deviating from the use of strict seniority to determine transfers out of a school when adherence to seniority ranking would adversely affect the racial balance of the school. In 1969, this so-called "80/20-90/10" standard was incorporated into a consent decree between the School District and PHRC. The policy remained in effect until, in 1978, it was supplanted by 75/125. Thus, for more than a decade prior to the adoption of 75/125, the School District employed race-

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NOTES *(Continued)*

Ct. 154, 178, 443 A.2d 1343, 1352 (1982), have consistently supported PHRC's findings that the Philadelphia school system continues to be racially polarized. For example, in 1982, the Commonwealth Court of Pennsylvania wrote:

> Thus today as in 1977 over two-third of all the black public school students in Philadelphia attend schools that are racially isolated containing proportions of black students in excess of 90%. . . . [W]e decide, as have other courts faced with the same issue and comparable facts, that a desegregation plan which leaves unaffected a substantial number of racially identifiable schools containing a high proportion of black students is insufficient. . . .

Id, 66 Commonwealth Ct. at 174, 179-180, 443 A.2d at 1352, 1354.

conscious assignment procedures—procedures which petitioners concede were reasonable and appropriate[3]—in order to move toward its goal of a unitary school system.[4]

In 1978, pursuant to the School District's application for federal funds for desegregation, OCR concluded that the School District's adherence to the numerical goals imposed under the consent decree with PHRC was insufficient to excuse the fact that many schools were ra-

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3. Petitioners have contended throughout this litigation that the School District should have pursued its integrational objective through other race-conscious means. *See Kromnick*, 739 F.2d at 908; Certiorari Petition at p. 21.

4. Contrary to petitioners' assertion that the 1969 consent order reached by the School District and PHRC was "completely independent of the protracted efforts by the PHRC and the state courts of Pennsylvania to achieve student desegregation, "Certiorari Petition at p.4, it is clear that both the School District and PHRC envisaged faculty integration as a tool and a benchmark in the broader quest for a unitary system. Each collective bargaining agreement between the teachers union and the School District from 1965 onward contained language attesting to the link between district pupils' right to educational equality and racial balance within school faculties. From 1968 onward each contract contained the following statement of policy: "The Board and the Federation agree that all children are entitled to an equal opportunity to obtain quality integrated education. This goal includes the presence of a meaningful number of experienced teachers in all schools and racial balance in faculties."

Meanwhile, PHRC's perspective on the relationship between faculty integration and school desegregation was reflected in a document prepared by it and the Pennsylvania Department of Public Instruction (now the Department of Education) entitled "Recommended Elements of a School Desegregation Plan." The document, which was prepared in 1968 and thereafter used as a guide for school authorities, identified as one of eleven factors which should be addressed when developing a desegregation plan, "Does the desegregation plan include procedures to affirmatively and effectively recruit and assign an integrated staff at all levels for all schools?" *Pennsylvania Human Relations Commission v. School District of Philadelphia*, 23 Pa. Commonwealth Ct. 312, 317, 352 A.2d 200, 203 (1976).

cially identifiable by their student populations. OCR also found that many schools, in addition to having racially lopsided student populations, were readily identifiable by racial composition of their teaching staffs as intended for students of a particular race. Furthermore, OCR intimated that the School District, by continuing to allow teacher choice to determine teaching assignments, was engaged in a *conscious* policy of racial segregation. In a letter addressed to the School District's Superintendent, the Associate Commissioner for Equal Educational Opportunity Programs within the Department of Health, Education and Welfare charged:

> [I]t is clear that compliance with the [PHRC consent] order . . . was not sufficient to overcome the persistent pattern of racial identification of schools by faculty assignment. Moreover, the district took no action to remedy that pattern beyond the minimal compliance with the PHRC order. In fact, the district has continued to allow teacher choice to determine teaching assignments even though, as the district representatives admitted, residential areas in the city are *de facto* segregated and teachers tend to choose schools nearest to their homes. *Thus it is our view that the natural, probable and foreseeable result of your district's teacher assignment policies was to maintain the racial identifiability of schools by the composition of their teaching staffs.* (Emphasis added.)

See Kromnick, 739 F.2d at 898. Against this backdrop, the School District adopted 75/125, and as a result, received federal funds for desegregation.

When, in 1982, the Philadelphia School Board convened to consider whether to continue implementation of 75/125, the backdrop had changed to the extent that, as a result of 75/125, the faculties throughout the school system were racially integrated. In other regards, however, circumstances were unaltered: in 1982, as in 1977,

over two-thirds of all black public school students in the system attended school where blacks represented more than 90% of the student population;[5] the School District was still under directives from PHRC and the Pennsylvania courts to redouble its efforts "to achieve more comprehensive desegregation," *Pa. Human Relations Commission v. School District of Phila., supra,* 66 Pa. Commonwealth Ct. at 179-180, 443 A.2d at 1355; the residential areas encompassed by the School District were still *de facto* segregated, *see id.* at 66 Pa. Commonwealth Ct. at 178, 443 A.2d at 1354; and, according to a report prepared by the School District's Executive Director of Personnel and Labor Relations, there continued to be both a limited number of open positions in the system, making race-conscious initial assignments an ineffective means of maintaining faculty integration, and a proclivity on the part of teachers to choose schools where the race of the majority of the students is the same as their own. Thus, the very same factors which led OCR, in 1978, to prescribe implementation of 75/125 still existed when the School Board in 1982 determined to continue the policy voluntarily.

In the Fall of 1983, the School District reached a new agreement with PHRC under which it undertook to desegregate 50 targeted schools by the 1988-89 school year. A critical factor in the School District's plan to achieve this goal—a plan which relies on voluntary student transfers rather than forced busing—is its ability to ensure to each parent and pupil in the system that the faculty at his or her school will be both qualified and integrated. Contrary to petitioners' assertion, the lengthy student desegregation proceedings discussed by the court of appeals have not terminated. *See* Certiorari Petition at pp. 13-14. The Commonwealth Court of Pennsylvania

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5. *Pennsylvania Human Relations Commission v. School District of Philadelphia,* 66 Pa. Commonwealth Ct. at 174, 443 A.2d at 1352.

retains jurisdiction over the case. Furthermore, should PHRC conclude in June, 1987 that the School District has not accomplished maximum feasible desegregation, PHRC will, under the terms of the agreement, petition the state court for evaluation of the School District's desegregation efforts by a court-appointed expert panel, and for an order enjoining the School District to take the necessary steps to achieve maximum feasible desegregation.

REASONS FOR DENYING THE WRIT

1. This Case Presents No Important Constitutional Or Statutory Issue.

Despite petitioners' attempts to make it appear otherwise, this case presents no novel or compelling issues of federal constitutional or statutory significance. The challenged policy is a modest one; it creates no racial preference, abrogates no seniority rights, affects no vested interest of the petitioners, imposes no stigma; and it is substantially related to the legitimate governmental objective of achieving and maintaining a desegregated school system. Race-conscious measures having far greater impact on individual interests and expectations have been validated by this Court. *See e.g., Fullilove v. Klutznick,* 448 U.S. 448 (1980); *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979).

Petitioners, nevertheless, assert that this case presents the Court ". . . with its first oportunity to determine whether traditional prohibitions on governmental consideration of race should take effect once the remedial objectives of race-based employment policies are satisfied." Certiorari Petition at p. 12. By misrepresenting the issue in this fashion, petitioners seek to inflate the legal significance of this case. Petitioners focus exclusively on OCR's 1982 finding that the School District's faculties were racially balanced in order to argue that faculty integration was an end in itself, unrelated to the

School District's efforts to remedy a stubborn pattern of *de facto* segregation in all aspects of the system. They ask the Court to ignore published PHRC guidelines which measure the efficacy of a system-wide desegregation plan, in part, on the basis of the steps taken by a school district to assign and maintain integrated faculties and staff. They would have the Court overlook biennially-adopted policy statements attesting to the School District's and the teachers' union's acknowledgement of the importance of integrated faculties to providing a quality education to each child in the school system. They would obscure the fact that an explicit basis for OCR's insistence on the School District's adoption of 75/125 was that racially identifiable faculties were a means of identifying schools as intended for students of a particular race. These facts undermine petitioners' attempts to deny the continuing remedial significance of 75/125 after 1982.[6] Moreover, since petitioners predicate their argument of this case's importance on the alleged absence of a remedial purpose behind 75/125, these facts constitute a thorough rebuttal to petitioners' claim that this case warrants Supreme Court review.

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6. The School District believes that remediation of past discrimination or unlawful racial segregation is not the only purpose that will justify its adoption of a carefully designed race-conscious policy. No case has impaired the validity of the Court's statement in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) that "School authorities . . . might well conclude . . . that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the board discretionary powers of school authorities. . . ." 403 U.S. at 16. Integration of school faculties is as legitimate and important a governmental objective as integration of the student population. *Porcelli v. Titus*, 431 F.2d 1254, 1257 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971). Thus, the School District submits that 75/125 would be permissible even in the absence of a determination that its purpose was remedial.

Petitioners contend that unless the Court grants the writ, the School District can permanently insulate 75/125 from judicial review by merely invoking fear of the consequences of any alternative measure; they assert that the School District will be encouraged to justify a race-conscious assignment policy on the basis of an illogical link between 75/125 on the one hand, and student integrational objectives on the other—objectives which petitioners claim the School District itself has abandoned. Certiorari Petition at p. 13. These arguments are without merit.

First, it could not be clearer that the circuit court scrupulously reviewed the record to determine whether the School District's concern that its faculties would revert to their previous level of racial imbalance was a rational one. *See Kromnick*, 739 F.2d at 908. Nor could it be clearer that the circuit court's decision was limited to the factual circumstances before it. The court explicitly declined to express an "opinion as to whether continued application of the 75%/125% plan would create an unconstitutional discrimination if there is a substantial change in facts." *Id.*, 739 F.2d at 908-909.

Furthermore, petitioners are alone in ascribing some inherent illogic to tying faculty integration to student desegregation goals. Even the district court acknowledged that ". . . the governmental objective of maintaining desegregated school faculties in order to enhance the educational opportunities of the school children is indeed a legitimate and important objective. . . ." *Kromnick v. School District of Philadelphia*, 555 F. Supp. 249, 254 (E.D. Pa. 1983). Of course, this Court has long recognized the significance of faculty assignments as indicia of a segregated system, *see Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18 (1971), and the appropriateness of faculty integration as a remedy for *de jure* segregation. *See United States v. Montgomery County Board of Education*, 395 U.S. 225, 235-36 (1969) and other cases cited at *Kromnick*, 739 F.2d at

905-906. This Court has also upheld congressional enactments prescribing faculty integration as a response to *de facto* segregation. *See Board of Education v. Harris*, 444 U.S. 130, 142-44 (1978). Thus, the circuit court's recognition that 75/125 played an appropriate role in the ongoing effort to desegregate the Philadelphia school system is completely consistent with the holdings of this Court.

Whatever important questions regarding the permissible uses of race-conscious measures remain to be addressed by the Court, *see, e.g., Firefighters Local Union No. 1784 v. Stotts*, ____U.S. ____, 104 S.Ct. 2576, 2590 (1984), petitioners have identified none which is squarely presented by this case.

2. The Decision Of The Circuit Court Conflicts With Neither The Holdings Of This Court Nor Decisions Of Other Circuit Courts.

Petitioners contend that in validating a race-conscious policy which was not necessary to remediate past discrimination in teacher assignments, the circuit court offended holdings of this Court in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), and *Stotts*. Petitioners contend that those cases hold that " . . . governmental race-conscious measures employed for 'benign' purposes . . . " are invalid unless they are "custom-tailored to satisfy specific remedial objectives." Certiorari Petition at p. 15. This attempt to fabricate a conflict between the circuit court's opinion and the opinions of this Court again hinges on petitioners' unsustainable argument that 75/125 was, and could have been employed in furtherance of a remedial purpose no broader than elimination of segregated faculties. It also assumes a nonanalytical approach to the *Bakke* and *Stotts* decisions.

Of course, *Bakke* addressed a policy which established a clear and rigid racial preference, as contrasted

with 75/125, which sets a 50 percentage point range within which the integrational goal can be met and affects blacks and whites equally. While the absence of an Opinion of the Court forecloses any affirmative reliance on *Bakke* as an expression of court doctrine, a survey of the opinions of the various Justices evidences a majority viewpoint that benign race-conscious measures do not necessarily offend the Constitution. Furthermore, there is a conspicuous absence within the various opinions of support for the proposition that benign race-conscious measures may only be justified by application of a strict scrutiny standard.

Stotts too is readily distinguishable on its facts from the circumstances in this case. Whereas in *Stotts*, the district and circuit courts compromised bona fide seniority rights of white employees for the benefit of blacks over the opposition of both the governmental employer and the affected union, in this case, 75/125 was agreed to by the School District and the Union, and it neither creates a racial preference nor abrogates any seniority right. Furthermore, the issue addressed in *Stotts* was the limits of judicial power to prescribe remedies which are racially preferential and override protected seniority rights. Nothing in that decision even addresses, let alone conflicts with the proposition that the Constitution or Title VII permits a voluntary race-conscious policy which is nonpreferential, does not override contractual seniority rights, and is substantially and reasonably related to a governmental remedial goal. Indeed, the Court expressly declined in *Stotts* to decide whether the racially preferential measure challenged there, had it been voluntarily adopted by the City of Memphis, would have run afoul of Title VII. *Stotts*, ____ U.S. ____, 104 S. Ct. at 2590. There can, therefore, be no colorable merit to petitioners' claim that the Court's opinion in *Stotts* interdicts a policy such as 75/125 which is nonpreferential and was voluntarily adopted by a competent governmental authority.

Just as petitioners have failed to identify conflicting Supreme Court holdings, they also have failed to marshal cases to support their argument that the circuit court's decision is in conflict with the holdings of other circuit courts. The two cases which they cite, *Oliver v. Kalamazoo Board of Education*, 706 F.2d 757 (6th Cir. 1983) and *Fort Bend Independent School District v. City of Stafford*, 651 F.2d 1133 (5th Cir. 1981), dealt with the limits of judicial authority to interfere with the decision-making power of local school authorities, *not* with the power of school authorities to voluntarily adopt limited race-conscious measures for legitimate and substantial reasons. The very first sentence of the *Oliver* decision defines the issues the court was addressing: "The issues presented in this proceeding involve the scope of *the district court's* remedial powers in a school desegregation case once a constitutional violation has been determined." 706 F.2d at 758 (emphasis added). Nowhere in the opinion is there even the suggestion that the Sixth Circuit Court undertook to determine the limits of a school district's discretion to adopt benign race-conscious educational policies.

Similarily, in *Fort Bend*, the issue concerned the limits on a federal district court to interfere in the political and administrative decision-making of local school authorities. The unusual circumstances in *Fort Bend* were that Fort Bend School officials sued to enjoin the merger of its district with another school district. The injunction was sought on the grounds that the proposed merger would interfere with efforts by the school district to eradicate the effects of past discrimination. The Fifth Circuit Court held that, as the Fort Bend School District had, by establishing a unitary school system, already remedied any past discrimination, the district court had no authority to enjoin the merger. It cannot reasonably be argued that this holding—that the absence of evidence of continuing vestiges of discrimination forecloses a federal

court from enjoining racially neutral attempts to alter or divide a school district—in some way conflicts with the ability of a school district to adopt voluntary non-preferential measures to serve remedial ends.

The circuit court's decision, rather than generating conflict, amply demonstrates through careful and thorough analysis of the relevant case authority, that the holding in this case is wholly consistent with the decisions of this Court and pertinent decisions in the other circuits. *See Kromnick*, 739 F.2d at 900-902, 903, 905-906, 906, 909.

3. This Is Not An Appropriate Case To Resolve The Issue Of The Standard For Determining The Constitutionality Of Benign Race-Conscious Measures.

The uniqueness and narrowness of the policy involved in this case makes it a poor vehicle for resolution of the complexities associated with determining the standard for judging the constitutionality of benign race-conscious measures. Policy 75/125 creates no racial preference; under this policy, blacks are equally likely as whites to be transferred involuntarily or have their placement options limited in order to preserve faculty integration. Therefore, review of this case would not afford the Court the opportunity to address the issue which is at the heart of the vast majority of affirmative action cases, namely the issue of the standard for determining the constitutional validity of benign race-conscious measures which benefit one race at the expense of another.

The absence of racial preference, moreover, makes it at least questionable whether this case is one of constitutional dimension. *See Kromnick*, 739 F.2d at 903. Petitioners heighten this doubt by their concession that other race-conscious measures, such as the School District's " . . . offering incentives to encourage teachers of a particular race to teach in schools where that teacher's race is in the minority" would be constitutionally per-

missible. *See Certiorari* Petition at p.21. It would thus appear that petitioners' grievance is not that the School District chose to employ a race-conscious device, but rather that it chose a race-conscious device which petitioners would not have chosen. Undoubtedly, the School District is vested with primary authority to determine which among an array of permissible devices best serves its legitimate educational objectives. *See Swann*, 402 U.S. at 16. Furthermore, as the circuit court observed, the School District chose 75/125 on the basis of a fund of knowledge and experience which amply supports the rationality of its choice of remedial device. *See Kromnick*, 739 F.2d at 908. The place for any further debate over the efficacy of this policy is the School District board room and the collective bargaining table—not the federal courts.

4. The Circuit Court Properly Reversed The District Court's Findings That 75/125 Was Not Remedial And That Only "Sheer Speculation" Supported The School District's Belief That Abandonment Of The Policy Would Lead To Reversion To Prior Levels Of Faculty Segregation.

As their final basis for urging the Court to grant certiorari, petitioners contends that review is necessary in order to vindicate the fact-finding competence of the district court. However, it is clear that the circuit court properly reversed the district court's findings that 75/125 had no remedial purpose and that no more than "sheer speculation" supported the School District's belief that abandonment of 75/125 would lead to reversion to prior levels of faculty segregation.

It is significant that the circuit court determined *as a matter of law* that the district court's concept of remedial was too narrow in light of the history of the desegregation effort in Philadelphia and the plethora of federal court decisions recognizing the remedial significance of faculty integration in pupil desegregation plans. *See*

Kromnick, 739 F.2d at 904-906. Furthermore, the circuit court properly found that the district court's "sheer speculation" finding was clearly erroneous in light of overwhelming and unrebutted evidence that the School District exercised its competence on the basis of years of experience with using race-conscious measures to achieve faculty integration, as well as on the advice of school officials who had responsibility for teacher assignments and who had studied the potential impact of changing the transfer policy. *See Kromnick*, 739 F.2d at 908. Moreover, the School District had the benefit of OCR's findings that the prior use of less restrictive race-conscious transfer policies had allowed teacher choice to perpetuate the existence of numerous racially identifiable school faculties within the system. Under these circumstances, the circuit court was well-justified in reaching a "definite and firm conviction that a mistake ha[d] been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to review the Judgment and Opinion of the Third Circuit Court of Appeals should be denied.

Respectfully submitted,

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